IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1508

FEDDERS CORPORATION,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER, FEDDERS CORPORATION

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ARGUMENT

Commission counsel contend (Resp. 4-5) that the Commission "acted well within its discretion" in concluding that any representation as to any one of a broad spectrum of performance characteristics of Fedders air conditioners (to wit, their air cooling, dehumidification, and circulation capabilities) is necessarily "reasonably related" to a representation concerning only the *uniqueness* of a single, narrow performance characteristic (to wit, "reserve cooling

power"). This contention is based upon the following two grounds (Resp. p. 4):

(1) "[Petitioner's] claim of unique cooling implies to consumers a superior ability to perform."; and

(2) "A consumer may be as deceived by misrepresentations that an asserted characteristic is unique as to representations that a product has a characteristic which in fact it does not. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. at 380, 389."

The second ground is obviously irrelevant to the issues here involved. No one challenges that a false uniqueness claim is capable of deceiving a consumer.

As to the first ground, it is true that the Court of Appeals sustained (Pet. App. 76 a) the Commission's finding that "the claim of uniqueness in having reserve cooling power was also a performance claim by implication". However, we respectfully submit that the learned Court erred in sustaining this finding, which is in the nature of a conclusion rather than a factual finding. Fedders, throughout these proceedings, has painstakingly demonstrated (Pet. 9-10) the wide difference, not only semantically but in nature and effect, between falsely claiming that a truthfully asserted performance attribute is unique to the advertiser's product and claiming a performance attribute which the product does not possess at all. Only in the very loosest semantic sense—the very sense which Commission counsel derides—can a claim of uniqueness be considered a performance claim.

The decisions of the Commission and of the Court below were not responsive to Fedders' exposition of these marked differences. But, as hereinafter set forth, this Court, in a different but analogous framework, has recognized dis-

tinctions strikingly similar to those which the Commission and the Court of Appeals saw fit to ignore in the case at bar.

Commission counsel have stressed *Federal Trade Commission* v. *Colgate-Palmolive,* 380 U.S. 374, in support of their position, and in particular, the language of this Court at 380 U.S. 389. That segment of the *Colgate-Palmolive* opinion concerns itself with the question of whether the use of a "mock-up" in television commercials of a shaving cream, without disclosing that it is a mock-up, constitutes a misrepresentation separate from a [redacted] *concededly false* performance claim made in the same commercials, to wit, a misrepresentation as to the moisturizing power of the product.* This Court decided that it was, saying:

> ". . . the undisclosed use of plexiglas in the present commercials was a material deceptive practice, independent and separate from the other misrepresentation found." (380 U.S. at 390).

Since the inclusion in the Commission's order against *Colgate-Palmolive* of a proscription against misrepresenting the moisturizing properties, or other performance characteristics, of its shaving cream product had the solid basis of a concededly false performance claim as to the moisturizing power of the product, it is plain that *Colgate-Palmolive* did not, in any way, sanction the Commission's

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* In the subject commercials the announcer informed the viewers that "To prove RAPID SHAVE'S super-moisturizing powers, we put it right from the can onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke." A visual demonstration accompanied this statement. The evidence revealed that the sandpaper depicted could not be shaved immediately following application of Rapid Shave but required a substantial soaking period. The evidence further revealed that what was purported to be sandpaper in the commercials was in fact a "mock-up" made of plexiglas to which sand had been applied. (380 U.S. at 376).

promulgation of an order embracing performance claims in a situation, like that in the case at bar, where the only proven violation is in respect to a non-performance claim.

We submit that if *Colgate-Palmolive* had not involved a concededly false performance claim as well as the use of a deceptive mock-up device, this Court would have narrowed the prohibitions of the order to the use of undisclosed mock-ups and regarded performance claims as not "reasonably related" thereto. The language of the Court in *Colgate-Palmolive*, at 380 U.S. 388, demonstrates the clear and basic difference between the two types of representations. At that point, citing a number of cases in support of its conclusions that the use of an undisclosed mock-up in a television commercial was a material deceptive practice, the Court stated that:

> ". . . all of the [cited] cases like the present case *deal with methods designed to get a consumer to purchase a product,* not with whether the product, when purchased, will perform up to expectations." (380 U.S. at 388). (Emphasis added).

The methods used in the cited cases "to get a consumer to purchase a product" include the misuse of a trade name (*F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, *F.T.C.* v. *Royal Milling Co.*, 288 U.S. 212, and *Howe* v. *F.T.C.*, 148 F.2d 561 (9th Cir. 1945), *cert. den.*, 326 U.S. 741) and the misappropriation of the Good Housekeeping Seal of Approval (*Niresk Industries Inc.* v. *F.T.C.*, 278 F.2d 337, (7th Cir. 1960), *cert. den.*, 364 U.S. 883). It is noteworthy that in none of these cases was the respective cease and desist order extended to any performance claims (*i.e.*, any claim that the product would "perform" up to a particular "expectation").

A false claim as to the uniqueness of a particular performance characteristic, like the wrongful use of a mock-up device, or of a trade name, or of the Good Housekeeping Seal of Approval, is a misrepresentation "designed to get a consumer to purchase a product" and not a misrepresentation as to "whether the product, when purchased, will perform up to expectations". Furthermore, not only is the uniqueness misrepresentation in the case at bar, as aforesaid, clearly conceptually different from a false performance claim, but is so different in its effect upon the consumer (Pet. 9-10), that the two types of claims can not be said to constitute "like and related" practices. Accordingly, basic fairness and equity demand that the scope of the order in the case at bar be limited to violations of the same *genre*, namely, uniqueness.

The order promulgated against Fedders is comparable in its scope to the *Colgate-Palmolive* order. Both orders encompass the deceptive non-performance practice engaged in by the respective respondents (use of undisclosed mock-ups by Colgate-Palmolive and false uniqueness claim asserted by Fedders). Similarly, each of these orders contain a proscription against the making of certain false performance claims (in *Colgate-Palmolive*, it was the moisturizing capabilities of its shaving creams; in the case at bar, it is the air cooling, circulation and dehumidification performance of Fedders' air conditioners). However, while *Colgate-Palmolive* in fact involved a false claim as to the moisturizing power of one of Colgate-Palmolive's shaving creams, in the case at bar there was no false claim whatever made as to the air cooling, circulation or dehumidification performance of Fedders' products.

In short, Fedders has been "fenced in" to the same extent as Colgate-Palmolive but for violations of the law substantially less comprehensive. There is, therefore, an evident need for this Court to define the boundaries of the doctrine of "like and related" practices as applied in deceptive advertising cases. The case at bar presents the opportunity for this Court to do so.

CONCLUSION

Fedders' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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